

COURT OF APPEALS  
HOLMES COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

GERALD SHEELY, et al.

Plaintiffs-Appellants

-vs-

SANDRA GINDLESBERGER, et al.

Defendants-Appellees

JUDGES:

Hon. Sheila G. Farmer, P. J.

Hon. W. Scott Gwin, J.

Hon. John W. Wise, J.

Case No. 16 CA 008

O P I N I O N

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common  
Pleas, Case No. 14 CV 033

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

January 11, 2017

APPEARANCES:

For Plaintiffs-Appellants

EDWIN H. BREYFOGLE  
108 Third Street NE  
Massillon, Ohio 44646

For Defendants-Appellees

THOMAS WHITE  
MATTHEW A. KEARNEY  
209 North Washington Street  
Millersburg, Ohio 44654

*Wise, J.*

{¶1} Appellants Gerald and Barbara Sheely appeal the August 20, 2016, decision of the Holmes County Common Pleas Court which granted Appellees' motion for execution, ordering the sale of lands pursuant to R.C. 2392.09.

{¶2} Appellees are Sandra Gindlesberger and Patricia Sheely.

### STATEMENT OF THE FACTS AND CASE

{¶3} For purposes of this Opinion, the relevant facts and procedural history are as follows.

{¶4} On or about May 5, 2014, Appellees Sandra Gindlesberger and Patricia Sheely filed suit against Appellant Gerald Sheely in the Holmes County Court of Common Pleas, Court Case No. 14CV033, alleging breach of fiduciary duty by the trustee of an express trust, conversion, and other relief.

{¶5} On March 10, 2015, the matter was tried to a jury which returned a verdict against Gerald Sheely. The jury awarded Appellees compensatory damages in the amount of \$112,396.00, punitive damages in the amount of \$11,239.60, and attorney fees.

{¶6} On March 21, 2016, Appellees filed a Praecipe for Writ of Execution requesting that the Clerk of the Common Pleas Court, Holmes County, Ohio, issue a Writ of Execution to the Sheriff of Holmes County, Ohio, on the default judgment rendered and entered on June 25, 2015, Holmes County Common Pleas Court Journal No. 213, Page 1, in Case No. 14CV033.

{¶7} On May 9, 2016, Appellees filed their Motion to Sell Lands pursuant to Ohio R.C. §2392.09. Three parcels of land were involved. One was a single parcel which was

Appellants' residence. The other two parcels were non-residential, non-contiguous vacant lots.

{¶8} Judgment Debtor Appellants objected to any sale, but with respect to the residential parcel, Appellants claimed that Gerald Sheely was entitled to exempt the property from levy under R.C. 2329.66(A)(1) in the amount of \$136,925.00.

{¶9} On August 24, 2016, an Execution of Lien hearing was held in the Court of Common Pleas, Holmes County, Ohio (Case No. 14CV033). All parties and counsel were present. Commercial and Savings Bank provided to the court an appraisal of the Appellants' property.

{¶10} The court considered and denied the Appellants' arguments contrary to Appellees' rights to foreclose against the Appellants' land and tenements under Ohio law.

{¶11} By Judgment Entry filed August 30, 2016, the trial court granted Appellees' Motion for Execution and found and ordered the following:

1. It was stipulated that any attempt to levy upon the Appellants' goods and chattels would be ineffective as the value of the goods and chattels would not exceed the exemption amount; and,
2. Upon appropriate Praecipe and Writ the Sheriff of Holmes County, Ohio, shall levy upon the lands and tenements of the judgment debtor pursuant to R.C. 2329.16; and,
3. The Court shall make determination of the amount of taxes, costs, fees, exemptions and liens after the sale of said lands and tenements.
4. Plaintiffs' Motion for Execution is hereby granted.
5. Costs taxed to Sheely Defendants.

6. This is a final order. There is no just cause for delay. The Clerk shall comply with Civ.R. 58.

{¶12} Appellant filed a notice of appeal from the August 30, 2016, Judgment Entry, to this Court, and the case has been assigned to the Accelerated Docket.

{¶13} Appellants assign the following error for review:

ASSIGNMENT OF ERROR

{¶14} "I. THE TRIAL COURT ERRED IN ORDERING A SALE OF PROPERTY WHEN THE TOTAL OF MORTGAGE LIENS AND THE APPLICABLE RESIDENTIAL EXEMPTIONS EXCEED THE VALUE OF THE PROPERTY."

I.

{¶15} In their sole Assignment of Error, Appellants argue that the trial court erred in ordering the sale of property in this matter. We disagree.

{¶16} In support of their assignment of error, Appellants' brief sets forth a citation to Ohio Jurisprudence followed by a three sentence argument, as follows:

An exemption is a statutory mechanism which allows a debtor to keep property that would otherwise be subject to sale to satisfy the debtor's legal obligations; thus, the substance of the benefit intended to be given to a debtor by the exemption laws is the right to hold property of a certain value free from seizure and sale by creditors under judicial process." 45 Ohio Jur. 3d 8, Exemptions 1, Homestead Section 1.

The operative words are "keep property". The property is clearly not of a sufficient value to pay the exemption in full. The Trial Court erred in ordering the residence sold.

{¶17} Upon review, we find that the trial court did not err in ordering the sale of Appellants' residence.

{¶18} The Ohio Revised Code provides that a judgment creditor may elect to enforce a judgment against a judgment debtor by either of the alternative methods provided by R.C. Chapter 2323 or R.C. Chapter 2329. *Feinstein v. Rogers* (1981), 2 Ohio App.3d 96, 440 N.E.2d 1207, syllabus.

{¶19} In *Feinstein v. Rogers, supra*, the court held that a lien established pursuant to R.C. 2329.02 is a specific lien within the meaning of R.C. 2329.07[sic], and therefore a plaintiff who obtains such a lien may enforce it by a foreclosure action. The court in *Feinstein* found that summary judgment was properly granted in favor [sic] the plaintiff in a suit to foreclose a lien established pursuant to R.C. 2329.02 where the plaintiff showed, by affidavits or other documents, that he obtained a judgment, filed a certificate of the judgment in the county where the defendants' real property was located, and had the certificate recorded. See, also, *Denune v. Carter-Jones Lumber Co.* (2001), 144 Ohio App.3d 266, 759 N.E.2d 1289. ("In general, liens may be enforced in several ways, *inter alia*, a[sic] R.C. 2323.07 foreclosure action or a writ of execution pursuant to R.C. Chapter 2329."); *Cent. Trust Co. v. Young* (Dec. 2, 1993), Franklin App. No. 93AP-785.

{¶20} "Foreclosure proceedings are governed by equity and statute. Upon entering a judgment of foreclosure, a court typically identifies the amount due, forecloses (i.e., cuts-off or excludes) the equity of redemption (usually providing the mortgagor with a three-day grace period to redeem the property), and orders the property to be sold by sheriff's sale, pursuant to the procedures set forth in R.C. Chapter 2329 (governing

execution against property). See R.C. 2323.07.” *Wells Fargo Bank, N.A. v. Young*, 2011-Ohio-122, ¶ 29 (2nd Dist. Darke).

{¶21} A judgment creditor may execute upon the real property of the debtor, regardless under which statute the creditor obtained his judgment. The Tenth Appellate District explained as follows:

R.C. 2329.02 is intended to create a specific lien upon the lands and tenements of the judgment debtor which lie within the county at the time there is filed in the office of the clerk of the court of common pleas of such county a certificate of judgment. The lien applies specifically to all such property identified as belonging to the judgment debtor at the time of the filing of the certificate *and may be enforced as a specific lien pursuant to R.C. 2323.07 by a foreclosure action.*

{¶22} Here, the record reflects that Appellees properly filed a Writ of Execution pursuant to R.C. §2329.09 rather than filing a separate foreclosure action pursuant to R.C. §2323.07.

{¶23} R.C. 2329.09 governs the execution against property. It states:

The writ of execution against the property of a judgment debtor issuing from a court of record shall command the officer to whom it is directed to levy on the goods and chattels of the debtor. If no goods or chattels can be found, the officer shall levy on the lands and tenements of the debtor. If the court rendering the judgment or decree so orders, real estate may be sold under execution as follows: one third cash on the day of sale, one third in one year, one third in two years thereafter, with interest on

deferred payments, to be secured by mortgage on the premises so sold. An execution on a judgment rendered against a partnership firm by its firm name shall operate only on the partnership property. The exact amount of the debt, damages, and costs, for which the judgment is entered, shall be indorsed on the execution.

{¶24} Appellants do not seem to take issue with the procedure in this matter, but rather that the property is not of sufficient value to pay the exemption in full.

{¶25} Upon review and in light of the fact that Appellants provide no law to support their assertion that a party obtaining a judgment under R.C. §2329.02 cannot levy execution upon property under R.C. §2323.07, we find Appellants' assignment not well-taken.

{¶26} Based on the foregoing, we find the trial court did not err in ordering the sale in this matter.

{¶27} The decision of the Court of Common Pleas of Holmes County, Ohio, is affirmed.

By: Wise, J.

Farmer, P. J., and

Gwin, J., concur.

JWW/d 0104